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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY, appellant

v.

THE UNITED STATES OF AMERICA, CHESAPEAKE Beach Railway Company, and Interstate Commerce Commission

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the Supreme Court of the District of Columbia (R. 43) is reported in 59 Wash. L. R. 410. The report of the Commission (R. 17) is reported in 166 I. C. C. 293.

JURISDICTION

The decree of the Supreme Court of the District of Columbia was entered June 17, 1931. (R. 49.) Petition for appeal was filed June 17, 1931, and was allowed the same day. (R. 49, 50.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

In the court below one of the questions presented was whether the Supreme Court of the District of Columbia has jurisdiction under the Urgent Deficiencies Act of October 22, 1913. Although this is a case of first impression upon the question of jurisdiction, we believe that the court below correctly held that it had jurisdiction. The questions presented in this brief are:

(1) Whether appellant failed to show that the Commission's order subjected it to legal injury and therefore can not maintain this suit.

(2) Whether appellant can maintain this suit if its sole ground of attack is that the Commission had no jurisdiction to enter its order.

(3) Whether there is sufficient evidence to support the jurisdiction of the Commission and its finding of public convenience and necessity.

(4) Whether appellant can question in this suit the railroad's charter power to operate a general ferry.

STATUTE INVOLVED

Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part:

(3) * * * The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, * * *. (C. 309, 36 Stat. 544; c. 91, 41 Stat. 474; U. S. C., Title 49, Sec. 1 (3).)

* * * * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (C. 91, 41 Stat. 477, U. S. C., Title 49, Sec. 1 (18).)

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act

shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (19).)

(20) * * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (20).)

STATEMENT

This is a suit under the Act of October 22, 1913, to enjoin an order of the Interstate Commerce Commission certifying that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company (hereinafter sometimes referred to as the railroad) of ferry

service across Chesapeake Bay between the eastern terminus of its line at Chesapeake Beach, Md., and Trippe's Bay, Md.

The railroad's line runs from Chesapeake Junction, D. C., to Chesapeake Beach, a distance of about 29 miles. (R. 168–169.) The railroad interchanges freight with the Baltimore & Ohio Railroad Company and the Pennsylvania Railroad Company, with which it connects, and is a party to joint tariffs filed with the Commission. (R. 61, 185.) If ferry service is established, the railroad will sell through tickets from Chesapeake Junction, D. C., to its ferry terminus on the Eastern Shore and will handle package freight from points in C. F. A. or trunk line territory to the same destination. (R. 68, 85–86.)

Appellant operates a ferry across Chesapeake Bay between Annapolis and Claiborne. (R. 111.) At the time of the hearing it also planned to operate ferries between Annapolis and a new eastern terminus to the north of Claiborne on Kent Island. (R. 112.)

The Commission found that the territory east of Chesapeake Bay, sometimes called the Del-Mar-Va Peninsula and sometimes called the Eastern Shore, is, in general, a fertile agricultural section whose natural markets are Washington, Baltimore, and points west; that the only routes to these markets from the southern part of the Eastern Shore are circuitous, due to the fact that there is no ferry service across the Bay south of appellant's ferry to Claiborne; and that the railroad's proposed ferry would shorten the distance

to Washington from representative points in the southern part of the Eastern Shore by 24 miles and by 36 miles from Cambridge, Md., which is a focal point for highways in that region. (R. 21.) The railroad expected its ferries to make the trip across the Bay in one-half hour less time than the ferries operated by appellant between Annapolis and Claiborne. (R. 62, 111.) The railroad's line to Chesapeake Beach, its proposed ferry route, appellant's existing ferry route, and the principal towns and highways of the Eastern Shore are shown on the map printed in the record as Exhibit 2. (R. 144A.)

The proposed ferry route, in addition to serving the business and social needs of Eastern Shore communities having an estimated population of almost 250,000 (R. 83, 137), would open to motor tourists and others a more convenient route between Washington and the Eastern Shore. The route would be more convenient in three ways—a shorter distance by motor, a quicker ferry trip, and avoidance of serious traffic congestion (R. 95, 96, 107-108) on the Washington-Annapolis highway and in the City of Annapolis. Under present conditions Ocean City, Md., Atlantic City, N. J., and Virginia Beach, Va., are about equally accessible from Washington by motor, but the proposed ferry would make the distance to Ocean City from 70 to 100 miles less than to the other two seaside resorts. (R. 93, 96.) The Washington manager of the Tour and Travel Bureau of the American Automobile Association predicted that the proposed ferry would double the traffic

across Chesapeake Bay in two years. (R. 95.) One witness testified that the time required for a trip between Cambridge, Md., and Washington would be practically cut in half. (R. 100.) A resident of Washington estimated that his summer place on the Eastern Shore could be reached in one-half the time needed for the present trip. (R. 101.)

In 1928 residents of the Eastern Shore organized a company for the purpose of operating a ferry across the Bay, selected the route between Trippe's Bay and Chesapeake Beach as a suitable one, secured an option on land at Trippe's Bay and applied to the Maryland Public Service Commission for a certificate of public convenience and necessity. (R. 97–99, 133.) The company did not press this application and later requested the railroad to interest itself in the project and transferred its option to the railroad. (R. 133.)

At the hearing before the Commission the proposed ferry route was strongly supported by the Secretary of the Washington Chamber of Commerce and by the chairman of its Transportation Committee (R. 100, 101), by the Washington manager of the Tour and Travel Bureau of the American Automobile Association (R. 92), by the president of a Washington wholesale distributing company (R. 100), by the office manager of a company engaged in the wholesale fruit and vegetable business in Washington (R. 103), by the manager of a hotel at Ocean City (R. 87), by five Eastern Shore business or professional men (R.

89, 90, 91, 97), and by a resident of Prince Frederick, Md., a town on the western shore of the Bay (R. 90).

During each of the years 1924 to 1928, inclusive, the railroad had a small operating deficit; in 1929 it had a small operating income. (R. 146.) It is in default on the principal and interest of a first mortgage bond issue of $1,000,000. (R. 139.) The railroad estimated the cost of the ferry project at $1,085,442, which it proposed to finance by the sale of $750,000 of new first mortgage bonds and $525,000 in equipment trust certificates (representing 75% of the cost of the two ferries which it would purchase). (R. 20, 139.) All of the railroad's present outstanding bonds are owned by a trustee, who has agreed to accept $600,000 of new second mortgage bonds in full satisfaction thereof. (R. 139–140.) The railroad estimated a substantial net return from ferry operations after allowing for interest on the first mortgage bonds and equipment trust certificates and amortization of the latter. (R. 151.) This calculation was based solely on the estimated revenue from motor vehicles and accompanying passengers; it did not attempt to estimate the revenue from passengers purchasing through tickets from Chesapeake Junction, D. C., to the ferry terminus on the Eastern Shore or from railroad package freight carried by the ferry. (R. 65–67, 147–148.) Operation of the ferry was also expected to increase railroad revenue, but no estimate was made of this additional revenue. (R. 69.)

Appellant, in opposing the extension of the railroad's line by means of ferry operation, contended

that the total actual and potential business was not sufficient to support its own and the railroad's ferry. (R. 113, 118–119, 120.) Nevertheless, it was then engaged in establishing a second ferry route of its own (R. 112) and it was operating at a substantial profit. Between January 1, 1922, and December 31, 1929, its surplus account increased approximately $475,000. (R. 186a, 200a.) Its operating profit, after depreciation, in 1928 was $170,336 and in 1929 was $184,990, representing a return on its average property investment in these years, respectively, of over 28% and over 22%. (R. 198a–201.)

The State of Maryland has long been interested in promoting ferry service across Chesapeake Bay. In 1916, after a number of financial failures in the operation of a ferry between Annapolis and Claiborne, the Governor of Maryland offered a bonus of $50,000 for the inauguration of regular ferry service between these points, an offer which appellant accepted. (R. 111.) Appellant also receives from the State an annual subsidy of $23,000, and the State has given annual subsidies to two other ferry companies operating across the Bay north of appellant's ferry. (R. 116, 120, 132.) The Maryland Public Service Commission advised the Interstate Commerce Commission that it did not desire to make any representations in the present proceedings. (R. 18.) After the Commission had filed its report and order herein, it received a letter from the State Public Service Commission stating that the latter did not waive its

right to test the matter in court if the railroad intended to establish a general ferry for the handling of intrastate traffic without submitting its case to the Maryland Commission. (R. 178–179.)

The Commission found that operation of the railroad's proposed ferry was in the public interest and that its competition would not seriously injure appellant. (R. 31–32.) It concluded that it had jurisdiction and filed a certificate of public convenience and necessity. (R. 32.)

Appellant thereupon filed its bill in equity in the Supreme Court of the District of Columbia to set aside the Commission's order. The railroad answered, denying the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220), and alleging that appellant was without legal right to maintain the suit. (R. 8, 11–12.) The Commission moved to dismiss the bill upon both of these grounds and the United States moved to dismiss the bill upon the latter ground. (R. 13, 34.) All three defendants also answered the bill upon the merits. (R. 7–12, 14–17, 34–38.)

The case was heard by a judge of the Court of Appeals of the District of Columbia and the Chief Justice and a justice of the Supreme Court of the District of Columbia. (R. 44.) The court, after holding that it had jurisdiction, construed the Commission's order as authorizing the railroad "to extend its rail line by ferry from the present terminus on Chesapeake Bay to the other side of the Bay," and held that this order was within the Commission's

statutory authority and supported by substantial evidence. (R. 45, 47–48.) The court found it unnecessary to decide whether appellant was the proper party to bring the suit, whether operation of a general ferry was within the railroad's charter powers, or whether the railroad could do an intrastate ferry business without first obtaining authority from the State of Maryland. (R. 47–48.) A decree was entered dismissing the bill for want of equity. (R. 49.)

SUMMARY OF ARGUMENT

I. Suit to set aside an order of the Commission can be brought under the Urgent Deficiencies Act of October 22, 1913, only by one whose legal rights are affected by the order. Appellant has failed to show that the Commission's order subjects it to legal injury. It has no legal right at common law to be free from competition and it has alleged no contract, franchise or statutory grant of exclusive ferry privileges. Since appellant is not a carrier subject to the Interstate Commerce Act, its right to be free from competition can not be predicated upon the provisions of that Act. It can not be assumed in the absence of convincing reasons that Congress intended the Act to confer legal rights upon a class of carriers which the Act does not either regulate or protect.

II. If, as appellant contends, the proposed ferry line is not to be used by or operated in connection with the railroad, and construction and operation of the ferry are therefore beyond the scope of the Interstate Commerce Act, setting aside the Commission's

order would give appellant no relief, since the decision would leave the railroad free to continue its ferry project. Suit can not be maintained under the Act of October 22, 1913, when the judgment which appellant seeks would be futile. Furthermore, appellant can not assert that the Act does not apply to the subject matter of the controversy and at the same time base its right to sue upon the theory that its right to be protected against the competition of the proposed ferry line is derived from the Act.

III. The Commission has jurisdiction to grant a certificate authorizing the construction and operation of a ferry used by or operated in connection with a railroad engaged in interstate commerce. The railroad in its application to the Commission stated that it desired to construct and operate such a ferry and there is evidence that the ferry will be so operated.

In determining the public convenience and necessity involved in the proposed ferry line the Act did not require the Commission to limit itself to consideration of the need for through railroad and ferry service. Every factor bearing upon the need for the proposed ferry, the service it would render, the traffic it would carry, the prospects of financial success, and the possible injurious effect of competition upon appellant could properly be considered by the Commission and were considered by it. There is ample support in the evidence for the Commission's order.

IV. Appellant can not in this proceeding question the railroad's charter power to operate the proposed ferry line. The Commission's order is permissible, not mandatory, and the railroad may, if necessary, later procure additional charter power. In addition, the question of *ultra vires* action can not be made the subject of collateral attack by third persons. Finally, relief against *ultra vires* action can not be obtained in a suit brought under the Act of October 22, 1913.

ARGUMENT

I

APPELLANT CAN NOT MAINTAIN THIS SUIT BECAUSE IT CAN NOT SHOW THAT THE COMMISSION'S ORDER INVADED ANY LEGAL RIGHT POSSESSED BY IT

Under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, District Courts of the United States are vested with jurisdiction of cases brought to set aside any order of the Interstate Commerce Commission. The statute is silent as to who may maintain such suits, but this Court has held that no such suit can be brought unless the plaintiff has been subjected to or threatened with a legal wrong by the order which is attacked. *Sprunt & Son* v. *United States*, 281 U. S. 249, 255–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 147, 148. The fact that the Commission's order deprived the plaintiff of a competitive advantage is not a sufficient basis for suit. *Sprunt & Son* v. *United States*, p. 256.

We submit that no actual or threatened legal injury to appellant results from the Commission's certificate authorizing the operation of a rival ferry line. The Commission's order may lead to competition where previously there had been no competition, but, apart from statute, appellant has no legal right to be free from competition. It does not claim any grant of exclusive ferry rights either by contract, franchise, or state law. The common law gives a carrier no legal right to prevent a competitor from invading a territory which the former already serves. *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, No. 51, decided by this Court November 23, 1931. *Pennsylvania R. R. Co.* v. *United States*, 40 F. (2d) 921, 925 (D. C., W. D. Pa.). Cases involving malicious injury are distinguishable. *Tuttle* v. *Buck*, 107 Minn. 145.

We also submit that no legal injury to appellant can be predicated upon the Interstate Commerce Act, because appellant, which operates a local ferry, is not a carrier subject to the Interstate Commerce Act.

We assume that an interested State is legally injured by an invalid order of the Commission authorizing an extension of the line of a railroad and that the State may sue to set aside the Commission's order. The right of a State to maintain such a suit has been tacitly recognized. *Colorado* v. *United States*, 271 U. S. 153. *Transit Commission* v. *United States*, No. 498, decided January 4, 1932. The right of a State to sue is necessarily implied, first, from the

statutory requirement (Sec. 1 (19), *supra*, pp. 3–4) that the interested State be notified and given an opportunity to be heard upon every application for an extension or abandonment, and, second, from the fact that, the statute being a direct limitation upon state power, unauthorized action under the statute constitutes legal injury to the State.

It may also be contended that the Act gives to carriers which are subject to the Act a legal right not to be injured by an invalid certificate of extension to another carrier. The amendments introduced by the Transportation Act, 1920, including those requiring approval by the Commission of any extension of a railroad line, are designed to protect the entire interstate railway system. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277. Accordingly it might be contended that, in aid of this purpose, carriers subject to the Act are protected against injury resulting from construction of a new line of railroad which would cause wasteful competition. If this contention were well founded legal injury upon which could be based a suit to set aside the order might be implied from the Act where a carrier subject thereto is affected by an erroneous order of the Commission authorizing an extension. In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, this Court sustained the validity of a certificate of extension granted by the Commission without passing upon the right of another carrier subject to the Act to bring

suit to set aside the Commission's order.* See *Chicago Junction Case*, 264 U. S. 258, 267.

But it is difficult to see how carriers which are not subject to the restrictions imposed by the Interstate Commerce Act can claim any rights thereunder. It can not be assumed in the absence of convincing reasons that Congress intended to confer benefits upon a class of carriers not included in those which it undertook to regulate. If the position of appellant and the railroad were reversed and appellant began to operate a new ferry line in competition with an existing ferry line of the railroad, neither the Commission nor the railroad would have any right under Federal law to interfere with appellant's undertaking.

If the right to sue to set aside an order of the Commission authorizing an extension is not limited to interested States and carriers subject to the Act, there would seem to be no limitation upon the class of those who may bring an independent suit to set aside such an order, and a community or any business

* Two specially constituted District Courts have expressed the opinion that a carrier has no legal right to be free from competition, and therefore can show no legal injury upon which to base an independent suit to set aside an order of the Commission granting a certificate of extension to a rival carrier. *Indian Valley R. R. Co.* v. *United States*, 52 F. (2d) 485, 487 (D. C., N. D. Calif.); *Pennsylvania R. R. Co.* v. *United States*, 40 F. (2d) 921, 925 (D. C., W. D. Pa.). In each of these cases, however, the court found that the Commission's order was valid.

concern threatened with competitive loss by the extension of a railroad line to a rival community or business concern could independently sue to set aside the order of the Commission authorizing the extension. Appellant derives no exceptional rights under the Interstate Commerce Act because it happens to be a carrier.

Since appellant can not show legal injury, either based upon the provisions of the Interstate Commerce Act or apart from that Act, appellant can not maintain this suit.

It does not follow from our contention that there can be no direct test of the validity of a certificate of extension where no carrier subject to the Act is affected. The validity of such a certificate can always be tested by a suit by the interested State.

II

EVEN IF APPELLANT COULD MAINTAIN THIS SUIT UPON THE GROUND THAT THE COMMISSION'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY IS NOT SUPPORTED BY EVIDENCE, IT CAN NOT MAINTAIN THE SUIT UPON THE SOLE GROUND THAT THE COMMISSION LACKED JURISDICTION TO ENTER ITS ORDER

Section 1 (18) of the Act (*supra*, p. 3) requires every carrier subject to the Act to obtain from the Commission a certificate of public convenience and necessity before it shall undertake the "extension of its line of railroad." Section 1 (3) of the Act (*supra*, p. 3) provides that the term "railroad" shall include all "ferries used by or operated in connection with any railroad." Appellant contends that the Commission was without jurisdiction to issue a certificate in this case because there was no evidence that the

proposed ferry line would be used by or operated in connection with the railroad of the Chesapeake Beach Railway Company.

We submit that if there was evidence to support the Commission's finding of public convenience and necessity, and if appellant is therefore limited to the contention that the Commission lacked jurisdiction to enter its order, appellant can not maintain this suit because it will derive no benefit from the relief which it seeks. Setting aside the order for lack of jurisdiction would give appellant no relief, because such a decision would not set up any bar against continuation of the ferry project; it would, at most, merely advise the State of Maryland that it had jurisdiction over the proposed ferry line.

In *Sprunt & Sons* v. *United States*, 281 U. S. 249, *supra*, the Commission's order required certain carriers to equalize their city-delivery and ship-side rates on cotton shipped to ports on the Gulf of Mexico. The carriers subsequently accepted this order, but the shippers attempted to appeal from a decree affirming the Commission's order. This Court, in holding that the shippers could not independently maintain the suit, gave as a ground for its decision (p. 258) that a judgment in the shippers' favor would be "futile" since it would leave the carriers free to continue to equalize rates.

Furthermore if, as appellant contends, the proposed ferry is not one to be used by or operated in connection with a railroad and is therefore beyond the scope of the Interstate Commerce Act, rights with respect

to it must be determined without reference to the provisions of the Act, and, as previously stated (*supra*, p. 14), independently of the Act appellant has shown no legal right to be free from honest competition. Appellant can not at one and the same time derive its right to bring this suit from the Act and assert that the Act does not apply to the subject matter of the controversy.

III

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURISDICTION OF THE COMMISSION AND ITS FINDING OF PUBLIC CONVENIENCE AND NECESSITY

The railroad in its application to the Commission stated that it proposed to establish a ferry "for the transportation of passengers and property" between the terminus of its line at Chesapeake Beach to Trippe's Bay on the opposite shore of Chesapeake Bay. (R. 125.) The application further stated that present and future public convenience and necessity required the establishment of the proposed ferry "so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland." (R. 125.) The railroad's Chesapeake Beach station is within a few feet of the shore line and the causeway and wharf to the ferry slip will run from the shore directly in front of this station. (Ex. 16, R. 156B.)

The Commission has jurisdiction to issue a certificate of convenience and necessity for any extension of a "line of railroad" by a railroad carrier subject to the Act and the term "railroad" includes any ferry

"used by or operated in connection with any railroad." (*Supra*, p. 17.) The Commission therefore had jurisdiction to enter its order in this case unless the evidence affirmatively establishes that the proposed ferry would not be used by or operated in connection with the railroad line of the Chesapeake Beach Railway Company.

We submit that this is not shown by the evidence, but that, on the contrary, the evidence shows that the ferry line, if constructed, will be operated in connection with the railroad line. An officer of the railroad testified that it would establish both a passenger station and a freight station at the eastern terminus of the ferry, that it would sell through passenger tickets from Washington, D. C., to this station and that package freight would be handled over the combined railroad and ferry lines. (R. 67–68, 85–86.) The relevancy of this evidence is not destroyed because no attempt was made to estimate the volume of such traffic. Since the ferry will tap a source of traffic from which the railroad is now completely cut off, any estimate of the extent of future through railroad and ferry traffic would necessarily be wholly speculative.

The entire evidence in the case does not establish, as appellant seems to contend (brief, pp. 27–36), the inherent improbability of any through railroad and ferry traffic. First, as to passenger traffic. An amusement park is being constructed at Chesapeake Beach. (R. 68, 71.) It is probable, indeed almost certain, that many of those who would use the rail-

road to reach the park would purchase through round trip tickets to the ferry station on the Eastern Shore so as to obtain at a small cost as part of a day's outing a boat trip across Chesapeake Bay and back. The proposed ferry would provide the most convenient route between a large section of the Eastern Shore and Washington, D. C. (*Supra*, pp. 5–6.) Many Eastern Shore residents would probably wish to save the ferry toll for automobiles ($5 minimum for a round trip, R. 67, 154) and would motor to the ferry station and complete the trip to Washington by ferry and railroad.

Second, as to freight traffic. The president of a company located in Washington, D. C., which is a wholesale distributor of gas and electric appliances and which makes less than carload shipments from Washington to towns in the Eastern Shore which the proposed ferry would serve, testified that it could use the ferry to very good advantage in making less than carload shipments to the Eastern Shore. (R. 100.) Appellant suggests that the railroad's ferry would not handle any freight because appellant's freight revenue has been slight although its Annapolis terminus is close to an electric railroad serving Baltimore and Washington. But it appears that appellant does not solicit freight traffic (R. 121), whereas the railroad will have a strong incentive to solicit through traffic since it will receive revenue from both the railroad and the ferry haul.

The railroad expected that operation of the ferry would increase its railroad traffic, both passenger and freight. (R. 69–70.)

Appellant contends (brief, pp. 21–23) that the only evidence which the Commission could lawfully consider in determining public convenience and necessity was evidence relating to the public need for through railroad and ferry service. We submit that this construction of the statute is erroneous.

In *Colorado* v. *United States*, 271 U. S. 153, 168, *supra*, this Court said that the Commission, in determining whether public convenience and necessity required the abandonment by an interstate carrier of a line of railroad wholly within a State, "must have regard to the needs of both intrastate and interstate commerce." It said further (p. 168):

> The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.

The same considerations govern when an application for a certificate of extension is presented to the Commission. The transportation needs of the local community to be served by the extension is a factor, and may be a compelling factor, in the determination of public convenience and necessity. The earning power of the proposed extension is also a factor of importance since these provisions of the statute are

intended to "prevent improvident and unnecessary expenditures." *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, *supra*. In determining earning power, the Commission must take into account the entire prospective revenue of the extension. It is therefore immaterial that in this case a very large part of the ferry revenue will be from traffic which does not also pass over the existing railroad line.

If our construction of the law is correct, there is ample support in the evidence for the Commission's finding that the present and future public interest and convenience require the construction and operation of the proposed ferry line. The evidence shows that there is a widespread demand for the proposed ferry by Eastern Shore communities; that the ferry will benefit a section of the Eastern Shore which is now handicapped by circuitous routes to market; that many interests in Washington, D. C., would benefit by the ferry; and that the management of the railroad, after a careful survey, concluded (R. 61–62) that the ferry line would be profitable and would help to sustain the operation of its railroad line. (*Supra*, pp. 5–7.)

The Commission considered and rejected appellant's contention that the competition of the proposed ferry might limit the appellant's ability to furnish adequate service. (R. 30–32.) In view of appellant's increasingly profitable operations and in view of the inauguration of its new ferry route north of the Annapolis-Claiborne route providing more frequent service and a shorter trip than by the proposed ferry,

the Commission was amply justified in concluding that appellant seemed "unduly alarmed" as to the effect of competition and that appellant "should be able to retain all traffic which normally should flow to its ferry." (R. 31–32.)

IV

APPELLANT CAN NOT QUESTION IN THIS SUIT THE RAILROAD'S CHARTER POWER TO OPERATE A FERRY

Appellant contends (brief, pp. 39–45) that the railroad's corporate charter does not give it power to operate the proposed ferry.

First, appellant's contention ignores the fact that the Commission's certificate is permissible and not mandatory. If, in fact, the railroad's charter must be amended to permit operation of the ferry, the railroad may well have decided to obtain the Commission's authority first. Second, the question whether a corporation is exceeding or has exceeded its charter powers can be raised only in a direct proceeding brought for that purpose; it can not be made the subject of collateral attack by third persons. *Cleveland, etc., Ry. Co.* v. *United States*, 275 U. S. 404, 414. *Kerfoot* v. *Farmers & Merchants Bank*, 218 U. S. 281, 287. Third, even if appellant were the proper party to complain, it may not do so in a suit brought under the Urgent Deficiencies Act of October 22, 1913. In *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, this Court held that relief against *ultra vires* action by a corporation could not be included in a bill under that Act to set aside an order of the Commission. It said (p. 488):

Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed, or that it should be reversed with directions to dismiss the bill upon the ground that appellant is not entitled to maintain this suit.

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JANUARY, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932